LIBRARY
SUPREME COURT, U. S.
FILED
FEB 6 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM 1974

NO. 74-974

CHARLES ROBERTSON, a/k/a CHARLIE ROBERTSON, a/k/a MR. CHARLIE, HOWARD PINDER, SR., ANNIE McCRAY, DEAN LUCAS, AND DONALD ROBERTSON, a/k/a DONNIE ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NICHOLAS J. CAPUANO
Attorney for Petitioners
19 West Flagler Street
Miami, Florida 33130

SHELBY HIGHSMITH and SIDNEY A. SOLTZ, *of counsel*

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	7
CONCLUSION	12
CERTIFICATE OF SERVICE	13
APPENDIX A—Opinion of Court Below	App. 1
APPENDIX B—Notice of Denial of Petition for Rehearing	App. 12
APPENDIX C—Statutes 18 U.S.C., Section 1955	App. 13
APPENDIX D—Statutes 18 U.S.C., Section 2516	App. 16
APPENDIX E—Statutes 18 U.S.C., Section 2518	App. 19

TABLE OF AUTHORITIES AND CASES CITED

Case	Page
United States v. Acon, 377 F.Supp. 649 (1974) appeal pending, 3 Cir. [No. 74-1766]	6
United States v. Alfonso, USDC-EDLa. (1974) on appeal, 5 Cir. [No. 74-3776]	7
United States v. Chavez, 94 S.Ct. 1849 (1974)	6, 10, 11
United States v. Giordano, 94 S.Ct. 1820 (1974)	8, 9, 10, 11
Iannelli v. U.S., Sup.Ct., Doc. No. 73-64	6
United States v. Maniscalco, USDC-EDLa. (1974) on appeal, 5 Cir. [No. 74-4100]	7
United States v. Bryan Roberts, John Joseph, et al., 5 Cir. [No. 74-1156]	7
United States v. Vigi, 350 F.Supp. 1008 (1972) appeal pending, 6 Cir. [No. 74-1748]	6

TABLE OF AUTHORITIES (cont.)

UNITED STATES STATUTES

	Page
18 U.S.C. §1955	2, 3
18 U.S.C. §2516	2, 3, 4, 5, 8
18 U.S.C. §2518	3, 8, 9, 10, 11

In the Supreme Court of the United States

OCTOBER TERM 1974

NO. _____

CHARLES ROBERTSON, a/k/a CHARLIE ROBERTSON, a/k/a MR. CHARLIE, HOWARD PINDER, SR., ANNIE McCRAY, DEAN LUCAS, AND DONALD ROBERTSON, a/k/a DONNIE ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 15, 1974, rehearing having been denied on January 10, 1975.

CITATIONS TO OPINIONS BELOW

The Decision and Opinion of the Fifth Circuit is found in Appendix A hereof, and is reported in ____ F.2d 984, the letter advising counsel of the denial of the Petition for Rehearing is found in Appendix B hereof.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1974. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

CAN A FACIALLY INVALID APPLICATION AND ORDER FOR AN ELECTRONIC INTERCEPTION PURSUANT TO 18 U.S.C., SECTION 2516 BE VALIDATED BY FACTS NOT KNOWN TO EITHER THE APPLICANT OR THE COURT AND NOT DISCOVERED UNTIL LONG AFTER THE ISSUANCE OF THE ORDER FOR THE ELECTRONIC INTERCEPTION?

II.

WAS THE CONVICTION OF CONSPIRACY A DUPLICATION OF THE CONVICTION IN VIOLATION OF 18 U.S.C., SECTION 1955 SO AS TO REQUIRE THAT THE CONSPIRACY CONVICTION BE REVERSED?

STATUTES INVOLVED

The statutory provisions involved are Title 18 U.S.C., Sections 1955, 2516 and 2518 which are printed in Appendix C, D and E, respectively hereof.

STATEMENT OF THE CASE

On the 18th day of November, 1971, Assistant United States Attorney GEORGE KOKUS appeared before the Honorable James Lawrence King, Judge, United States District Court for the Southern District of Florida, with an application for an Order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code. At the same time, FBI Agent KEITH UNDERWOOD appeared before the Honorable James Lawrence King and executed an Affidavit in support of said application. The Court, pursuant to said application and Affidavit and relying on the statements as set forth therein on that date, entered an order authorizing the interception of wire communications between the Defendants herein from telephone number 813-763-2032, a telephone subscribed to by the Defendant, HOWARD PINDER, SR., and located in his premises in Okeechobee, Florida.

As a result of the intercepted wire communications a search warrant was subsequently issued and searches were conducted of various premises occupied by the Defendants herein and of the Defendants. Subsequently the Defendants were indicted by a Grand Jury in Miami, Florida.

In the application for the interception order Mr. Kokus stated that he had been authorized by the **Acting**

Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry E. Petersen, who had been specially designated in the proceeding by the Attorney General of the United State, the Honorable John N. Mitchell, to apply to the Court for an interception order, and the Court, pursuant to the application and Affidavit and relying on this representation entered its order herein stating as follows:

> "WHEREFORE, it is hereby ordered that:
>
> Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized by the **acting** Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry E. Petersen, who has been specially designated in the proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to . . ."

The "authorization" from Mr. Mitchell to Mr. Petersen was dated November 15, 1971 in the form of a memo which stated "Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing GEORGE A. KOKUS to make the above described application" and pursuant thereto Mr. Petersen, the "Acting" Assistant Attorney General, sent a letter to Mr. Kokus wherein he stated "Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General

of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications to and from the facility described above, for a period of fifteen (15) days."

Subsequently on the 18th day of February, 1972, in connection with another case pending before the United States District Court for the Southern District of Florida, the Attorney General of the United States, John N. Mitchell, submitted an Affidavit wherein he stated among other things that although Section 2516 of Title 18, United States Code, permitted him to designate an Assistant Attorney General to authorize applications for wire interceptions without his approval, he never chose to make such designation and he further stated that since November 20, 1971, he has personally authorized all applications for interception orders pursuant to Title 18, United States Code, Section 2516.

Mr. Mitchell was subpoenaed to appear before the Honorable William Mehrtens, Judge, United States District Court, for an evidentiary hearing regarding the procedures followed by him and the United States Department of Justice in approving wire communication interception and the transcript of said hearing has been made a part of this proceeding. In said hearing Mr. Mitchell not once in connection with the numerous cases that he was testifying about, had any independent recollection of any of his actions regarding those cases. Further, at said hearing, when Mr. Mitchell was asked whether or not he had any recollection of determining

the question of "need" stated, "I am sure that the matter of need was inherent in the picture in all of the cases I have examined."

The Defendants also filed a Motion to Dismiss the conspiracy count based upon the rationale of Wharton's Rule, which motion was also denied by the Court.

The Defendants then appealed to the United States Court of Appeals for the Fifth Circuit and the Court of Appeals affirmed the convictions of the Defendants.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the allowance of the writ are as follows:

First: The first issue involved raises a substantial and important question of Federal constitutional law and appears to be in direct conflict with the dicta of this Court in **United States v. Chavez,** 94 S.Ct. 1849 (1974).

Second: The question raised by issue number 2 is presently pending before this Court in the case of **Iannelli v. United States of America,** Docket No. 73-64, certiorari granted May 28, 1974.

The issue involved in this petition concerns a substantial question of law, of major significance, the adjudication of which is known to be currently pending in both the Sixth and Third Circuits in **United States v. Vigi,** 350 F.Supp. 1008 (1972), assigned No. 74-1748 of the Sixth Circuit, and **United States v. Acon,** 377 F.Supp. 649 (1974), Third Circuit No. 74-1766. The Acon case had been as-

signed for oral argument on December 12, 1974. In Vigi, briefs of all parties have been filed, but at present no date has been assigned for oral argument.

Likewise, an appeal is also pending in the Fifth Circuit in **United States v. Bryan Roberts, John Joseph, et al,** [5 Cir. No. 74-1156], involving this identical issue, the argument on which had also been scheduled for December 12, 1974, at Houston, Texas.

Additionally, notices of appeal have been recently filed in two cases decided by the United States District Court for the Eastern District of Louisiana, posing this identical issue, one from an order granting suppression, and the second from a conviction and the denial of suppression. **United States v. Maniscalco,** USDC-EDLa. 1974, on appeal, 5 Cir. No. 74-4100, and **United States v. Alfonso,** USDC-EDLa. 1974, on appeal, 5 Cir. No. 74-3776, respectively.

ARGUMENT

In **United States v. Chavez,** supra, the particular question adjudicated was, once it is established that the Attorney General in fact authorized a wiretap application, whether suppression shall be ordered in instances where the wiretap application and interception order incorrectly identify the authorizing official as an Assistant Attorney General [an official, however, holding such office by Presidential appointment and Senatorial confirmation]. In resolving this question the Chavez Court enunciated the principle that the misidentification of the authorizing official [provided he be one of those individuals designated by Congress to grant wiretap applications] does not re-

quire suppression when the Attorney General, himself, is shown actually to have authorized the application. This Chavez issue, although often misunderstood by many, is not the question under consideration in this appeal.

The Giordano (**Giordano v. United States of America** 94 S.Ct. 1820 (1974) case involved issues separate and independent from those raised in Chavez. In Chavez it was claimed that the application and order failed to comply with §2518(1)(a) and (4)(d), for which reason suppression should be granted under §2518(10)(a)(i) and §2518(10)(a)(ii). There the respondents claimed both that the communications were "unlawfully intercepted" [§2518 (10)(a)(i)] and that the interception order was "insufficient on its face" [§2518(10)(a)(ii)]. In rejecting the latter contention [§2518(10)(a)(ii)], this Court explicitly found that the interception order was not facially insufficient because:

> "Here, the interception order clearly identified 'on its face' Assistant Attorney General Wilson as the person who authorized the application to be made. Under §2516(1) he properly could give such approval had he been shown to be incorrect does not detract from the facial sufficiency of the order." [94 S.Ct. at 1855 — Emphasis supplied.]

The converse of that rule must be recognized and applied with equal force. Even though it may be subsequently shown by "after the fact" affidavits of Justice Department Officials, or otherwise, that an official clothed with the requisite statutory authority [§2516(1)] did in fact authorize the wiretap application, suppression is re-

quired where the application and interception order "on their face" identify, as the authorizing official, an individual who does not possess the requisite statutory authority to authorize wiretap applications.

Giordano considered the question whether it is necessary for suppression under §2518(10(a)(ii)) that the statutory violation charged must be of such a constitutional magnitude that it substantially and directly affected the fulfillment of the Congressional intent in enacting Title III. This Court clearly found that §§2518(10)(a)(ii) and 2518(10)(a)(iii) "plainly reach some purely statutory defaults without constitutional overtones, and those omissions cannot be deemed unlawful interceptions under paragraph (i), else there would have been no necessity for paragraphs (ii) and (iii) — or to put the matter another way, if unlawful interceptions under paragraph (i) include purely statutory issues, paragraphs (ii) and (iii) are drained of all meaning and are surplusage." [94 S.Ct. at 1832].

In Giordano this Court further observed that "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." [94 S.Ct. at 1832].

The effect of Giordano is that evidence must be suppressed for violations of §2518(10)(a)(ii) ["insufficiency on its face" provision] whether or not the violations substantially and directly affect the fulfillment of the Congressional intent in enacting Title III. The latter criteria is applicable only to violations of §2518(10)(a)(i).

Thus, while this Court in Giordano did not consider whether an application for, and an interception order are "insufficient on their face" in reciting that the authorizing official is an Acting Assistant Attorney General, as a consequence of which the contents of any intercepted wire communications, and evidence derived therefrom, must be suppressed under 18 U.S.C. §2518(10)(a)(ii), which is the issue posed by this appeal, it is submitted that the challenge asserted herein is a "purely statutory default" recognized by the Giordano Court to require suppression under §2518(10)(a)(ii).

The Court of Appeals, we respectfully suggest, has failed to apply the principles enunciated in Giordano and Chavez for the apparent reason that it had been misled as to the question posed. Under no concept whatever is either case authority for the principle that the contents of intercepted wire communications, and evidence derived therefrom, shall not be suppressed under §§2518(10)(a)(ii) and 2515 when the application and interception order recite that the authorizing official is an Acting Assistant Attorney General and it is shown otherwise that the Attorney General in fact authorized the application.

The panel mistakenly believed the question to be whether the Justice Department followed the requisite statutory procedures when authorizing the wiretap application [Slip Opinion, p. 987]. Those procedures, whether or not correctly employed, are of no moment whatever in resolving the actual issue raised in this appeal. The panel's concern in that area was misdirected, and we believe caused it to fall into error.

In concluding that the Supreme Court decision in **United States v. Chavez,** supra, "compels rejection of appellants' challenge" [Slip Opinion, p. 968], the Court of Appeals failed to perceive the propositions for which Chavez and Giordano stand. As we have endeavored to show, the question posed is not one directly involving Chavez. We suggest that the signal importance apparently assigned by the Court of Appeals to Justice White's majority opinion in Chavez is misplaced, as evidenced by the following language found in the panel opinion:

> "Since the misidentification of the officer authorizing the wiretap did not substantially and directly affect the fulfillment of the congressional intent behind Title III, The Court found the communications were not 'unlawfully intercepted' within the meaning of 18 U.S.C. §2518 (10)(a)(i)." [Slip Opinion, p. 988].

Chavez in fact does support the proposition that when communications are claimed to have been "unlawfully intercepted" [§2518(10)(a)(i)], in order to be suppressed, it must be shown that the basis for the claim of unlawful interception substantially and directly affected the fulfillment of the Congressional intent in enacting Title III. However, that this criteria is applicable only to those instances involving §2518(10)(a)(i) and not §2518(10)(a)(ii) has been made clear by this Court in Giordano. In concluding otherwise, the Court of Appeals erred.

CONCLUSION

In view of the foregoing reasons and also in view of the fact that issue number two herein is presently pending before this Court, it is respectively submitted that this Petition should be granted.

Respectfully submitted,

NICHOLAS J. CAPUANO

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this _____ day of _____, 1975, upon the following person by depositing four copies of same addressed to them in the United States mail with sufficient air mail postage prepaid:

Solicitor General
United States Department of Justice
Washington, D.C. 20530

_____
Of Counsel for Petitioners